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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.Q. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.Q. et al.,

Defendants and Appellants.

E047656

(Super.Ct.No. J203385 & J203386)

OPINION

APPEAL from the Superior Court of San Bernardino County. Marsha Slough,
Judge. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and
Appellant J.Q.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and
Appellant D.N.

Liana Serobian, under appointment by the Court of Appeal for Defendant and Appellant D.Q.

Ruth E. Stringer, County Counsel, and Sandra D. Baxter, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minors, S.Q. and Z.Q.

Defendants and appellants J.Q. (Mother), D.Q. (Father), and the maternal grandmother, D.N. (Grandmother) appeal from the juvenile court's ruling terminating the parental rights of parents to S.Q. and Z.Q., their twin daughters (the twins) on February 4, 2009, under Welfare and Institutions Code¹ section 366.26. Both parents contend the juvenile court erred (1) in denying their section 388 petition seeking return of the children to their custody or, in the alternative, placement with Grandmother; (2) in finding that the beneficial parent-child relationship exception to adoption did not apply; and (3) in finding that the sibling relationship exception to adoption did not apply. Grandmother also challenges the juvenile court's denial of her section 388 petition and claims that she was denied her due process rights to confront and cross-examine witnesses at the hearing on her petition.² For the reasons described below, we affirm the court's ruling.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² All parties appealing have joined in each other's briefs.

I. PROCEDURAL BACKGROUND AND FACTS

In August, 2005, Mother gave birth to the twins, who tested positive for opiates. Mother told the hospital social worker that she suffered from manic depression and took methamphetamines and marijuana during her pregnancy because she was unable to continue taking antidepressants. Mother was counseled to resume taking her antidepressants, but she refused. Mother acknowledged that her living situation was chaotic and that Father also had a history of drug use, but she denied any domestic violence. When Mother did not cooperate with voluntary services, the twins were detained.

On August 17, 2005, San Bernardino County Children and Family Services (CFS) filed petitions on behalf of the twins, alleging jurisdiction under section 300, subdivisions (b) and (j). Finding a prima facie showing, the court ordered the twins detained. The court ordered weekly supervised visitation with the parents. The twins were placed together in a confidential foster home.

On September 16, 2005, the parties participated in mediation and a partial agreement was reached. On November 1, the parents submitted on the petitions and reports. The court sustained the allegations (some as amended) in the petitions, declared the children dependents, ordered them removed from the custody of the parents, and ordered CFS to provide reunification services and supervised visitation. Among other things, the parents' reunification plans included domestic violence counseling, general counseling, random drug testing, attendance at an out-patient substance abuse program,

and a Twelve Step program.³ On November 28, the parents informed the social worker they would test dirty.

In a six-month review report dated May 1, 2006, CFS noted that the twins remained in the same foster home, that Father admitted to a 20-year addiction to methamphetamine, that the parents were participating in an inpatient substance abuse treatment program, and that they maintained regular, positive visits with the twins. Based on the recommendation of CFS, the court ordered an additional six months of reunification services.

Six months later, in November 2006, CFS reported that the twins remained in the same foster home, that Mother gave birth to a son, D.Jr.,⁴ in September, that the parents had completed an inpatient substance abuse treatment program and were making progress in an aftercare program, that the visitation between the parents and the twins was successful to the point that unsupervised visitation was initiated in October, and that there was a marked change in Mother's personality. CFS recommended and the court ordered an additional six months of services.

At the 18-month review hearing, the twins remained in foster care; however, CFS recommended they be returned to the parents with six months of family maintenance services. The parents had obtained a home in Running Springs, Father was working, and Mother remained at home with D.Jr. The parents had successfully completed many of

³ Mother was also required to obtain a psychological evaluation and participate in psychotropic medication evaluation and monitoring.

⁴ Because D.Jr. is not a party to appeal, he is referenced only when necessary.

their required programs and had weekly overnight visits with the twins, who “[knew] them and respond[ed] to them as parents.” Both CFS and Mother expressed concerns about Mother’s ability to provide care for six-month-old D.Jr. and the 18-month-old twins; however, with family and community assistance, they believed Mother would have sufficient support. On February 15, 2007, the twins were placed in the custody of their parents. A review hearing was set for March 20.

On March 2, 2007, the social worker visited the parents. Father expressed concern about Mother being inside the house all day everyday with only the children. Otherwise, the home was clean and the parents appeared to be providing good care to the children. A status review hearing was set for August 15, 2007.

In the August 2007 family maintenance review report, CFS noted that the twins remained with the parents, and that Father remained employed. The parents were in the process of moving. Mother had experienced problems with medication but she addressed those by seeking treatment, having her medication changed, and having the first foster parents assist with the twins. CFS arranged for child care payments to the first foster parents, who were assisting the parents with the twins. The parents maintained sobriety. Following the recommendation of CFS, the court ordered an additional six months of family maintenance services.

In September 2007, Mother mixed psychotropic and pain medication, causing her to sleep and experience mood swings and affecting her ability to care for the children. Father was instructed that Mother should not be left alone with the children. In January 2008, Father relapsed and used methamphetamine. Thus, the twins were removed from

parents' custody and section 387 petitions were filed on February 7, 2008. The petitions alleged that placement with the parents was no longer appropriate because of Father's relapse into using methamphetamine, Mother's unstable mental health and abuse of pain medication, both parents' domestic violence, and both parents' resistance to services. On February 8, the court found a prima facie showing had been made and ordered the twins detained out of home. A jurisdiction/disposition hearing was set for February 29, 2008.

According to the jurisdiction/disposition report, CFS recommended the twins be removed from the parents' care and that the parents receive no reunification services. Father admitted he had relapsed; however, he said that he would never have admitted it if he had not been caught. Mother admitted the parents fought in front of the children. Father stated that as soon as he returned home from work, Mother would shove the twins at him, screaming that she had been stuck with them all day. Father acknowledged choking and slapping Mother on different occasions. Father recognized that Mother's mental health was unstable. The parents had not consistently participated in services, although they did re-enroll after being informed that CFS would not recommend continuing services. The twins spent most of July, August, and September, as well as part of October, in full-time "day-care" with the first foster parents, sometimes for days and nights at a stretch. The case notes attached to the April 2008 addendum report noted Mother's regression and Father's concern. Father was observed as being overwhelmed, close to the breaking point. The twins were tense and anxious around Mother but ran willingly and happily to Father.

Following several continuances, on May 12, 2008, the parents submitted on the petitions and reports. Grandmother was present. By stipulation, the court found true that “[p]arents have failed to participate regularly in services designed to assist the family in overcoming the problems which brought [them] to the attention of [CFS].” The court found by clear and convincing evidence that the parents had failed to participate regularly and make substantive progress to complete their court-ordered reunification plans. The progress of the parents was described as minimal. Reunification services were terminated. Parental visitation was ordered one time a week for two hours and CFS was authorized to locate a concurrent planning home for the twins. Grandmother was also authorized to visit (separately from the parents) weekly. A selection and implementation hearing was set for September 9.

In the interim review report dated June 26, 2008, CFS noted the parents were enrolled in an outpatient substance abuse treatment program and were participating in a domestic violence/anger management class. Mother was scheduled to undergo a psychological evaluation. CFS recommended that the twins not be placed with Grandmother and that visitation with the parents be reduced to one time per month for two hours because a prospective adoptive home had been located. In the August 4 interim review report, it was noted that Mother had completed a psychological evaluation with Dr. Heidi Knipe-Laird. The doctor noted Mother’s limited knowledge and interest in the world around her (consistent with that of individuals who have lost many of their formative years to drug addiction) and her immature cognitive and emotional development. Mother suffered from major depression and dependent personality

disorder. Although Mother's alcohol and amphetamine addictions were in full remission, the doctor noted her "thinking is still very much the thinking of an addict, complete with unrealistic ideation, denial of problems, blaming of others, and self-absorption."

Dr. Knipe-Laird recommended that Mother participate in individual therapy and continue to work on her recovery. Regarding the possibility of returning the twins to Mother, the doctor opined that, given Mother's lengthy history with CFS, "a case can be made that prolonging this case much further is not in the best interest of her children." However, the doctor noted that "genuine recovery from an addicted way of life is a slow process, with many false starts and reversals. . . . [Mother] has the potential for emotional growth, although a time frame is impossible to predict."

On August 7, 2008, the court ordered that the twins be placed immediately in the prospective adoptive home. The court also ordered CFS to facilitate supervised visitation with the parents every other week for one hour. Relative preference was no longer preserved. The section 366.26 hearing was set for September 9, 2008, and then continued to January 27, 2009, for a contested hearing. The section 366.26 report/adoption suitability assessment indicated the twins were adoptable. The twins had lived with their first foster parents from the time of their birth until age 18 months. Then they lived with their parents for the next year; however, they spent a substantial period of time with the first foster parents in July, August, September and October 2007, and lived with them from February 2008 until August 18, 2008. At that point, they were placed in a concurrent planning home. The prospective adoptive parents (de facto parents) formed

an attachment to the twins, were committed to meeting their needs, and were granted de facto parent standing on December 31, 2008.

Both parents and Grandmother filed section 388 petitions. All three asked the court to modify its prior order terminating reunification services and to return the twins to the parents. Grandmother also requested that the twins be placed in her custody if they were not returned to the parents.

In response to the section 388 petitions, CFS opined the parents had failed to show changed circumstances, that it was not in the twins' best interest to grant any of the petitions, and that the court should proceed with the selection of adoption as the twins' permanent plan. In October 2008, CFS reported that visitation with the parents was temporarily suspended because of the twins' health and the scheduling problems of the parents for the next date. As a result of having witnessed the domestic violence between the parents, the twins were having "flash backs" and nightmares. According to CFS, the twins had a primary attachment to their first foster parents, a "relationship" with their parents that showed signs of being a "disturbed attachment," and had attached to their de facto parents. Regarding their brother, D.Jr., the twins did have a relationship with him, and the de facto parents were willing to allow them to continue that relationship.

Regarding placing the twins with Grandmother, the social worker opined that it would be harmful to do so because Grandmother would not be willing or able to protect them from inappropriate contact with the parents. The social worker also noted that she had to limit Grandmother's visits with the twins to times when the parents were not visiting because

of the disruption to visitation when Grandmother would engage in arguments with Mother, creating emotional chaos.

A contested hearing on the section 388 petitions, as well as the section 366.26 hearing, commenced on January 27, 2009, and concluded on February 4. The parties agreed the evidence presented in any one hearing could be used for all hearings. Mother called Rusty Broderick, the program director for the substance abuse programs at Rim Family Services. Mr. Broderick testified that both parents, due to their successful completion of the program, had the skills needed to maintain sobriety and did not require any further substance abuse treatment. Mother's next witness was Jonathan Stiansen, a therapist at Rim Family Services. Mr. Stiansen provided Mother with individual therapeutic counseling. He testified that Mother was responsive to the counseling, which was ongoing; however, she did not require any further individual counseling. He stated that her mental health was stable and her depression symptoms had decreased.

Lori Lefler, operations manager and counselor at Domestic Violence Education and Services (DOVES), monitored the parents' visitation with the twins from February through August 2008. Ms. Lefler described the visits as having enthusiastic greetings, laughing, giggling, and kisses and hugs. The end of the visits was positive. The twins did not appear to be afraid of the parents. In Ms. Lefler's opinion, the twins had a secure relationship with the parents and were bonded to them. Ms. Lefler also testified that the parents attended domestic violence classes at DOVES, and yet they both denied there had been any domestic violence within their relationship. She acknowledged that such denial could be seen as evidence of a lack of benefit and insight. Regarding the parents'

domestic violence, the social worker, Lisa Brenner, testified that Father had reported that Mother would yell and scream, and throw things in front of the children. Father admitted slapping Mother and almost choking her, and said he would leave to prevent any further violence.

Grandmother testified that her conviction of driving under the influence in 2005 prevented her from being considered for placement of the twins. Regarding alcoholism in the family, Grandmother denied that she enabled the maternal grandfather, failing to recognize his alcoholism until after they divorced. Their divorce caused Mother to act out as a teen. Although Grandmother could not initially take the twins, she stated that now she could and would hire a licensed caretaker or nanny to assist her.

Mother testified. She admitted the twins were originally detained in 2005 because of her drug use and domestic violence; however, upon completing her case plan, the twins were returned to her and Father in February 2007. A year later, the twins were detained again. Since the twins' last detention, Mother had completed an outpatient substance abuse program and a domestic violence program, along with participating in several parenting programs. She underwent a psychological evaluation and was participating in individual counseling. Mother stated she had been clean and sober since April 2006 but continued participating in an aftercare program and attending Narcotics Anonymous and Alcoholics Anonymous meetings twice a week. Mother acknowledged she had abused her psychotropic medication and had a mental breakdown. When the social worker wanted to put Mother back in an inpatient program, Mother responded by going off her medication. She was currently taking Wellbutrin as prescribed. Mother

agreed that taking care of three children had been a real challenge, but she was willing and able to ask for help and had a support system. She admitted that while the twins were placed in the custody of her and Father for the one year of family maintenance, she was not allowed to be alone with the children from July 2007 to February 2008. Mother also admitted that her mental health throughout the family maintenance period had adversely affected her ability to parent her children. Regarding Mother's mental health breakdown, the social worker disagreed with Mother's characterization that her mental health breakdown was the result of doctors giving her a "bad set of medication." Instead, the social worker described the various prescriptions Mother had in her possession and observed, "you can't take all of those at the same time and have a positive outcome." Mother was concerned the twins were pulling away from her and Father because they did not see them enough; however, the social worker testified that throughout the case, Mother complained the twins had not bonded to her.

Patrick Griffiths, a marriage and family therapist at Rim Family Services, testified that Grandmother was angry with CFS for not returning the twins to the parents, even though Father had relapsed. Grandmother stated she felt CFS was "unfairly treating the whole family." Grandmother did not want to discuss the parents' drug issues, causing Mr. Griffiths to opine that "[Grandmother] was not recognizing the seriousness in what was going on"

Father testified. He and Mother married on February 1, 2008. He admitted to an approximate 25-year history of drug addiction. He stopped using drugs in March 2006 and relapsed in January 2008. After completing the programs again, Father believed he

had learned how to stay sober. He described his visits with the twins as going well. The social worker agreed there were no problems reported during visitation; however, the social worker noted the twins had behavioral issues before and after the visits and sometimes did not want to attend. Father opined that Mother was a capable parent as far as he was concerned.

Ms. Brenner testified that she was assigned to this case from its inception to October 2008. She acknowledged that when the twins were in the parents' custody under the family maintenance plan, they appeared clean and well cared for, the home was clean, and there was food in the home. Mother received support from family, the landlady,⁵ and CFS; however, despite all the support systems in place, there was domestic violence, homelessness, and a relapse into drug use, which caused the twins to be removed in February 2008. Observing the twins, Ms. Brenner opined they were much more affectionate and at ease with Father than with Mother. According to Ms. Brenner, the twins were bonded to the first foster parents and were attached to the de facto parents and the birth parents. She believed they were not bonded to the parents because they were not in the parents' custody during their early development.

The parents' former landlady, Jennifer Kellum, opined that Mother had a difficult time caring for the twins on a full-time basis. Ms. Kellum also opined that Mother did

⁵ Although the landlady became very involved in the parents' lives, she was causing problems by trying to control the situation. She refused to provide the parents with a bill that would break down utility costs so that the parents could seek financial assistance. Thus, Ms. Brenner agreed that if the parents needed to move out of the home to protect the twins, then they should do so.

not display appropriate parenting skills. For example, Mother allowed too much water in the bathtub while giving the twins a bath, and she would set food still boiling from the microwave in front of the twins, who would burn their fingers when they touched it.

The first foster mother had been a foster parent for 33 years. She expressed her belief that the parents could not care for the twins. She described the twins' behaviors and reactions to visitation with the parents, her observations of how Mother acted with them, and her attempt to express her concern to CFS.

Janice Duncan, the social worker who replaced Ms. Brenner, testified that she had received the case around November 18, 2008. Ms. Duncan described the visitation between the twins and the parents. The twins were excited and happy to see the parents, and they enjoyed the visits. While Ms. Duncan acknowledged the twins were attached to the parents, she stated they were not bonded to the parents, and thus, termination of parental rights was appropriate.

One of the de facto parents testified that the twins had been placed with them on August 18, 2008. The twins missed their first foster parents and mentioned them. The twins did not ask for their birth parents. The de facto parent believed the twins were attached to her and her partner, not the birth parents.

Following argument from counsel, the juvenile court denied all the modification petitions. The court specifically found that the parents were credible.⁶ Acknowledging the parents' progress, the court found that the parents had not shown changed

⁶ The court also commented on the social worker's conduct, which had created an environment of mistrust.

circumstances, nor had they shown that returning the twins to their home was in the twins' best interests. Specifically, the court stated: "I think one of the most telling facts when it comes to that is the statement made by Ms. Levine, and that is that these parents have parented these girls for eight months, approximately eight months, of their lives. That during the time of their family maintenance, they returned to old ways, old habits, with Father's relapse, with Mother's depressive disorder. [¶] . . . [¶] These parents have been offered, I believe, if my calculation is correct, 31 months of services. And I think they have made progress, but I do not believe that the circumstances have changed to the point where these two girls should be returned to their parents. [¶] And even if they had changed, though I do not believe that they have, I don't believe it's in the best interest of these girls to be returned to Mother." Regarding Grandmother, the court noted that when the parents could not take care of the twins, they were taken to the first foster family, not Grandmother.

After finding the twins were adoptable and that no exceptions to adoption applied,⁷ the court terminated all parental rights.

II. DENIAL OF SECTION 388 PETITIONS

Mother, Father and Grandmother each challenged the juvenile court's order denying their section 388 petitions.

⁷ Specifically, regarding a bond between the twins and D.Jr., the court opined that the bond was not sufficient enough that it would be in the twins' best interest not to be freed for adoption.

A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529 (*Kimberly F.*)). Generally, the petitioner must show by a preponderance of the evidence that the child's welfare requires the modification sought. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.) The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *In re S.J.* (2008) 167 Cal.App.4th 953, 959-960.)

A. Mother's Section 388 Petition.

Here, Mother claims that she established changed circumstances “by actively participating in services and eliminating any risk to the [twins].” Specifically, she notes

that D.Jr. was returned to her custody, and thus, she had “made a complete reformation in that she fully addressed the reasons that [the twins] were redetained.” She further claims that returning the twins to her custody was in their best interests because the reasons for their detention were not that serious and were completely resolved, and their attachment to Mother was “at least as strong as, probably much stronger than, the attachment they had to their caregivers.” She again notes the programs she had completed. Regarding the bond, she emphasizes the fact that the twins enjoyed visitation with the parents.

We reject Mother’s argument that her “complete reformation” provides good cause to grant her section 388 petition. The fact that she addressed the reasons for the twins’ redetention is not a changed circumstance when the evidence shows she had difficulties with depression, inappropriate use of psychiatric medications, and a long history of drug use. She initiated drug rehabilitation programs during the dependency and experienced periods of sobriety; however, she relapsed.⁸ She was in ongoing counseling and was on medication. When taking care of the twins became too stressful, she turned to others for assistance. When the assistance wasn’t enough, she resorted to overmedication. Her continuous efforts at rehabilitation are admirable, but her sobriety and good mental health at the time of the hearing represent merely changing circumstances, not changed circumstances (see *In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49), given the number of years she has abused drugs, the fact that she has suffered

⁸ In her reply brief, Mother claims she “never relapsed and had been clean and sober for years.” However, Mother fails to recognize that her abuse of prescription drugs has the same consequences as abuse of illegal drugs.

from serious mental health issues, and the brief time she has been clean, sober and mentally healthy.⁹

As counsel for minors aptly notes, this case is similar to *In re William B.* (2008) 163 Cal.App.4th 1220, decided by our colleagues in the Fourth District, Division Three. In that case, the parents were provided extensive services to address their drug dependency. The children were detained and returned to the parents three times. The court reviewed the numerous services provided to the parents over the years and concluded that “notwithstanding the ‘staggering amount’ of services previously offered to the mother, [the juvenile court] gave her ‘one more chance’ and ordered services. [¶] Three times is enough.” (*Id.* at p. 1223.) Regarding the sobriety of the parents, the court observed that “[a]ny significant periods of sobriety were achieved only while under [CFS’s] supervision. When that support was no longer available, the mother quickly relapsed.” (*Id.* at p. 1228.) Therefore, giving mother yet another chance to reunify with her children was not in their best interests, nor was providing reunification services to their father. (*Id.* at pp. 1228-1230.) Here, although Mother gained custody of the twins only one time since the inception of the case, during that time she was provided with extensive services, including in-home services and child care (despite the fact that

⁹ In her reply brief, Mother notes that D.Jr. was returned to her and argues, “as [D.Jr.] was at the same risk of harm at removal, if there was no risk to him by the time of the hearing then there was no risk to [the twins].” We disagree. Mother fails to recognize her limitations when charged with having custody of three small children versus one small child.

Mother was a stay-at-home mom). Even with all the services provided to her, she could not take care of the twins.

Regarding the twins' best interests, several witnesses testified that while the twins had an attachment to Mother, they were not bonded to her. Mother had three years to overcome her problems that led to the removal of the twins. During that time, the twins had lived with her for only one year, and at least half of that year, they were being taken care of by other people. Even with the assistance of CFS, her family and friends, Mother was unable to cope with the challenges of being the mother of three small children. More importantly, counsel for minors points out the twins' diagnoses of "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, Chronic," which resulted from their "multiple placements and exposure to frequent emotional stressors since birth." Once placed with the de facto parents, the twins had improved in all aspects of their lives. To disrupt this attachment is not in the best interests of the twins. Thus, the court did not abuse its discretion in denying her section 388 petition.

B. Father's Section 388 Petition.

Like Mother, Father argues that his successful recovery from his single relapse to drugs establishes changed circumstances. Moreover, Father notes that the parents share a loving relationship, Mother's depressive disorder is under control, they have adequate housing, and Father is employed.¹⁰ Most significantly, Father points out that D.Jr. was

¹⁰ In his reply brief, Father reviews the parents' actions from July 2007 to February 2008 and blames the social worker for causing the situation that resulted in the twins being placed in a prospective adoptive home. Specifically, Father notes it was the
[footnote continued on next page]

returned to their care. However, as we observed with Mother, Father's sobriety is still relatively new and untested. Moreover, Father lacks insight into the harm caused by Mother. Despite Mother's emotional instability and past actions towards the twins and Father, Father testified that her mental health issues never interfered with her ability to provide a safe and nurturing home except during a period in July 2007. Further, he "never saw any problem with her parenting" Clearly, Father's inability to recognize Mother's shortfalls demonstrates there has been no change in the circumstance of his ability to protect the twins and provide a safe and stable home. As CFS points out, "Without a protective parent in the home, a parent capable of determining when a child is in need of protection, it cannot be in that child's best interests to be returned to that home." The court did not abuse its discretion in denying his section 388 petition.¹¹

[footnote continued from previous page]

social worker who instructed Father (1) not to leave the children alone with Mother; (2) to move out of their home where the landlord was being inappropriate; and (3) to leave the children with the first foster parents under a daycare arrangement. Father faults CFS for criticizing him for following the social worker's directives. He further notes it was only after his relapse in January 2008 that the twins were removed. Thus, Father argues the issue is whether he dealt with drug addiction, Mother's overmedication, domestic disputes, housing, and employment issues by the time he filed his section 388 petition. Like Mother, Father fails to understand Mother's limitations in caring for three young children. Despite all the assistance that Mother was provided, she was unable to manage a home and family. This, in turn, affected Father's ability to perform his role in the family.

¹¹ The analysis of the twins' best interests as stated in the discussion of Mother's section 388 petition claim equally applies to Father's.

C. Grandmother's Section 388 Petition.

Grandmother faults the juvenile court for denying her section 388 petition, claiming the court's reason for doing so is unclear. Nonetheless, she contends that she addressed the psychological issues that led CFS to negate her as a placement option for the twins, and that it was in their best interests to be placed with her. She argues that: (1) she completed the required counseling; (2) she can comply with any court order limiting the parents' contact with the twins; (3) she improved her relationship with Mother; and (4) she has a stable work schedule that will allow her to take care of the twins on a full-time basis. Regarding the twins' best interests, Grandmother points to her continuous visitation with the twins, who were comfortable in her presence and knew her as their "grandma."

In response, CFS contends the reasons for the denial of Grandmother's section 388 petition are "abundantly clear." Specifically, CFS points out: (1) Grandmother was never there to assist the parents with caring for the twins or providing a home; (2) she declined to provide a permanent home in 2006 and 2007; (3) she continued to minimize the significance of the parents' problems with drug abuse; (4) she found Mother's abuse of legal drugs less harmful than the abuse of illegal drugs; (5) she believed that the twins should have been returned to Mother's custody because she was not using illegal drugs; (6) a significant conflict between her and Mother existed; and (7) she suffered a DUI conviction in 2005. CFS argues that Grandmother, at trial and on appeal, discounts the significance of the above, which shows the "circumstances regarding placement with [Grandmother] were neither materially changed, nor in the children's best interests." We

agree.¹² Regarding the twins' best interests, we note they have never lived with Grandmother, they were not bonded to her like they were to the first foster parents, and Grandmother was not the one who was there for the twins when they needed to be detained outside the home. The court did not abuse its discretion in denying Grandmother's section 388 petition.

III. BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION TO TERMINATION OF PARENTAL RIGHTS

Both parents contend the exception to parental rights termination set out in section 366.26, subdivision (c)(1)(B)(i) applies in this case, and therefore, the juvenile court erred when it terminated their parental rights to the twins.

Once reunification services have been terminated and the child has been found adoptable, "adoption should be ordered unless exceptional circumstances exist." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) Pursuant to section 366.26, subdivision (c)(1)(B)(i), the court may find a compelling reason for determining that termination would be detrimental to the child if the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. The

¹² In her reply brief, Grandmother faults the court for chastising her for not being sufficiently involved in Mother's life. Grandmother contends that her compliance with the court's directive to attend counseling to deal with her issues of "co-dependency" and "enmeshment" with respect to Mother "is precisely the material change of circumstances which warranted the placement order she sought." We disagree. While we commend Grandmother for obtaining the counseling necessary to address her relationship issues with Mother, we note this was not the only reason Grandmother's section 388 petition was denied. More importantly, it was not until the parents were facing termination of their parental rights that Grandmother stepped up to take a more active role.

parents have the burden of proving that termination would be detrimental to the child under one of the enumerated exceptions. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207.) “[I]t is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.*, *supra*, at p. 1350.) “A finding no exceptional circumstance exists is customarily challenged on the sufficiency of the evidence. [Citations.]” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; see also *In re Jerome D.*, *supra*, at p. 1207.) “On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]” (*In re Autumn H.*, *supra*, at p. 576.)

The “beneficial parental relationship” exception applies where “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the

adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.]" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id.* at pp. 575- 576.)

Regarding the first prong of the statute, i.e., maintaining regular visitation and contact, both parents claim they consistently visited the twins and that the twins enjoyed the visits. While the twins were detained in 2005, there was a one-year period when they were returned to the custody of the parents. However, the record shows that during the one-year period, Mother required the assistance of the first foster parents and the landlady in caring for the twins. In fact, at least half of the time the parents had custody of the twins, others were taking care of them. Thus, while we agree that the parents did visit the twins regularly and there was a period of time when custody was returned to the parents, the fact remains the parents were unable to maintain custody. Following the redetention of the twins, the parents resumed visitation. However, the visits, like the temporary custody, never rose to the level of establishing the emotional bond that exists between a parent and child. While the twins were happy to spend time with the parents, they were not bonded to the parents. Instead, the twins were merely attached to them. As CFS points out, there was no evidence the twins would suffer any particular detriment from severing their relationship with the parents. When the twins knew they would be visiting

their parents, they became “clingy and/or whiney” with the de facto parents, hanging onto their legs and not wanting to let them out of their sight. After the visits, the twins were not sad, they merely walked out of the room. Later, they experienced behavioral problems.

Regarding the second prong, i.e., the twins would benefit from continuing the relationship, there is insufficient evidence that they would benefit more from continuing their parent-child relationship with the parents than from adoption. At the time of the section 366.26 hearing, the twins had lived with the de facto parents for five months, about the same time they had lived with their birth parents, and were not spending a significant period of time in day care or the care of others. There was a strong bond between the twins and the de facto parents. The twins were happy and the de facto parents were committed to them, wanting to adopt them to provide a loving and a nurturing home environment. As CFS states, despite the progress the parents made, their history shows that when confronted with the stress of providing and caring for the twins, not to mention Mother’s life-long problem with depression, the parents resorted to drug use. Even when under proper medication, Mother did not know how to parent her children. She was emotionally abusive to the twins, screaming at them, stating they are “horrible, ugly, stupid children.” Father did not recognize that Mother’s behavior was harmful and a serious problem.

For the above reasons, we conclude the juvenile court reasonably found there was insufficient evidence that the twins would benefit more from continuing their relationship with the parents than from adoption. The twins were doing well in their prospective

adoptive family's home. There is no evidence that they would be harmed—much less “greatly harmed” (see *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953)—by severing their relationship, if any, with the parents.¹³ Nothing in the record suggests that the twins have any needs that only the parents can meet. Although the parents clearly love the twins, “this is simply not enough to outweigh the sense of security and belonging an adoptive home would provide.” (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.) The court thus properly found that the beneficial parental relationship exception to terminating parental rights did not apply.

IV. BENEFICIAL SIBLING RELATIONSHIP EXCEPTION TO TERMINATION OF PARENTAL RIGHTS

Father contends, and Mother and Grandmother join in such contention, that the juvenile court should have applied the beneficial sibling relationship exception. Section 366.26, subdivision (c)(1)(B)(v) provides an exception to termination of parental rights where termination would cause a substantial interference with the sibling relationship. “If termination will substantially interfere with the sibling relationship, section 366.26,

¹³ Although Father argues the twins had a “significant, positive, and emotional relationship” with him, the social worker testified that the twins were not bonded to the parents, merely attached. During oral argument, counsel for Mother challenged our recognition of a difference between being “bonded” versus being “attached.” Counsel argued the two words are interchangeable as evidenced in case law. While it appears that no case has had to make the distinction between the two words, given the facts before this court we find such distinction necessary. Thus, we turn to the dictionary for guidance. “Bond” is defined as “a uniting or binding element or force.” (Webster’s 9th New Collegiate Dict. (1991) p. 166.) “Attachment” is defined as “the state of being personally attached[;] affectionate regard.” (*Id.* at p. 113.) Comparing the dictionary definitions, we conclude that a bond is stronger than an attachment.

subdivision (c)(1)(E) [now, subdivision (c)(1)(B)(v)] lists numerous factors the juvenile court is to consider in determining whether the circumstance of any given case warrant the application of the exception. First a juvenile court must consider the nature and extent of the relationship, including, but not limited to, factors such as 1) whether the child was raised with a sibling in the same home, 2) whether the child shared significant common experiences, or 3) whether the child has existing close and strong bonds with a sibling. If the relationship exhibits some or all of these factors, the juvenile court must then go on to balance any benefit, emotional or otherwise, the child would obtain from ongoing contact with the sibling against the benefit of legal permanence the child would obtain through adoption. [Citations.]” (*In re Erik P.* (2002) 104 Cal.App.4th 395, 403.) The court’s findings will be upheld on appeal if supported by substantial evidence. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at p. 947.)

The parent seeking to assert the sibling relationship exception bears the burden of asserting and demonstrating its existence. (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 401.) As with the beneficial parental relationship exception, Father fails to meet his burden of establishing the exception applies. Father claims the exception applies because the twins had lived with D.Jr. for half of their lives, sharing common childhood experiences. He argues that two of the social workers believed the twins would suffer from terminating their relationship with D.Jr. He notes that one social worker opined “the girls have a relationship attachment to their brother [D.Jr.] and this relationship should be protected.” More importantly, he points out the report that the twins shared a

strong relationship with D.Jr., calling him “‘baby [D.Jr.]’ and naming their baby dolls ‘baby [D.Jr.]’” Father states that during visitation, the twins asked for D.Jr.

CFS does not dispute the existence of a bond between the twins and D.Jr. Instead, it argues that the bond was not compelling. The juvenile court recognized the existence of the bond but expressly found that the relationship between the children was insufficient to outweigh the twins’ interest in being adopted. We agree. There is no evidence that severing the sibling relationship would cause detriment. While the twins asked for D.Jr. during visits, there is no evidence that his absence was emotionally detrimental to them. There was no psychological study or other evidence that showed that the twins would suffer if separated from D.Jr. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.) Therefore, the court’s decision was sound.

Furthermore, even if there were some slight detriment, the twins’ interests in a permanent placement outweigh any benefit of not being adopted. (*In re Megan S., supra*, 104 Cal.App.4th at p. 252.) If parental rights are terminated, the twins will gain a permanent home through adoption. If parental rights are not terminated, the twins may lose the permanent home the prospective adoptive family is ready to provide. A sibling group of three children might not be considered adoptable at a later time. Valuing a continuing relationship with D.J. over adoption might deprive the twins of a family, which is not in their best interests.

Substantial evidence supports the court’s conclusion that the benefits of adoption outweighed the benefits of continuing the twins’ relationship with D.Jr., even if it is

assumed that termination of parental rights would result in a substantial interference with the sibling relationship. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 952-953.)

V. GRANDMOTHER’S SECTION 388 HEARING

“Rule 5.570(h) of the California Rules of Court governs the conduct of hearings on section 388 petitions. It requires that a section 388 petition hearing be conducted in the same manner as a dispositional hearing if ‘(A) The request is for removal from the home of the parent or guardian or to a more restrictive level of placement; or (B) There is a due process right to confront and cross-examine witnesses.’ Otherwise, ‘proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.’” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 913.) With respect to juvenile court hearings “[d]ue process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.]’ [Citations.]” (*Id.* at p. 914.) “[O]nce it has been concluded that a due process right exists we balance . . . factors . . . to decide what process is due. [Citation.]” (*In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. omitted.) “Due process generally requires, however, that parents be given the right to present evidence, and to cross-examine adversarial witnesses, such as the caseworker and persons whose hearsay statements are contained in the reports, ‘i.e., the right to be heard in a meaningful manner.’ [Citations.]” (*In re Lesly G.*, *supra*, at p. 915.)

The juvenile court held a full evidentiary hearing on all three section 388 petitions. Furthermore, the court determined that it would hear all three petitions together at the

same time as the section 366.26 hearing. Grandmother challenges the court's decision to exclude her as a witness during Mother's case-in-chief regarding Mother's section 388 petition. She argues that she was denied her due process right to confront and cross-examine witnesses during that portion of the trial, and the court compounded its error by failing to inform her that she could, if she chose, recall those witnesses.

During the hearing on Mother's section 388 petition, two witnesses testified outside the presence of Grandmother, namely, Rusty Broderick, Mother's drug abuse counselor, and Jonathan Stiansen, Mother's therapist.¹⁴ Grandmother claims she was prejudiced by not being able to confront and cross-exam Mr. Stiansen regarding his testimony that Grandmother enabled Mother's dysfunctional behavior. She also faults the juvenile court for not informing her that she could recall Mr. Griffiths to confront him regarding his conclusion that she was angry with CFS. She claims her unfamiliarity with court proceedings caused her to assume that she could not recall him and to agree to offer a statement in lieu of cross-examination.

In response, CFS argues the challenged testimony was irrelevant to the issue of placing the twins with Grandmother. Furthermore, CFS claims that even if the witnesses did make any statement regarding placement with Grandmother, they were not adversarial to Grandmother's position. CFS points out that Mother's petition sought placement of the twins with Grandmother as an alternative to return to Mother, and thus

¹⁴ Both witnesses were called by Mother.

she had her own burden of establishing whether placement with Grandmother was in the twins' best interests. Given this burden, Mother's counsel would have been aware of the need to question the two witnesses on the issue of alternative placement.¹⁵ Thus, CFS asserts the fact that Mother's counsel did not do so suggests there was no relevant or beneficial information that could have been obtained. More importantly, CFS argues that because placement with Grandmother never arose within the testimony of either Mr. Broderick or Mr. Stiansen, and that Grandmother had an opportunity to present testimony to rebut Mr. Griffiths' testimony, there was no due process violation. We agree.

Assuming without deciding that the juvenile court erred in excluding Grandmother from the hearing during the testimonies of Mr. Broderick and Mr. Stiansen, such error requires reversal only if it resulted in prejudice to Grandmother. Whether we assess prejudice under the *Watson*¹⁶ standard or under the more stringent *Chapman*¹⁷ standard, we conclude that the juvenile court's error was harmless. The merits of Grandmother's petition turned on her willingness and interest in becoming a concurrent planning home for the twins. The testimonies of Mr. Broderick and Mr. Stiansen regarding family history and modeling behavior relating to the relationship between the maternal

¹⁵ In her reply brief, Grandmother claims she did not seek the same relief as Mother. However, given Mother's alternative request of placing the twins with Grandmother, the fact remains that Mother's counsel would not seek to elicit any testimony detrimental to this alternative request.

¹⁶ *People v. Watson* (1956) 46 Cal.2d 818, 836.

¹⁷ *Chapman v. California* (1967) 386 U.S. 18, 24.

grandparents were not relevant on this issue. Thus, the court's failure to grant to Grandmother access to these two witnesses for cross-examination was not prejudicial.

VI. DISPOSITION

The orders appealed from are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.